No. 2955

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIE DING AND LOUIE LUNG GIN,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, Judge.

Brief of Plaintiffs in Error

WALTER S. FULTON, and
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STATEMENT OF THE CASE

The indictment in this case charged the plaintiffs in error Louie Ding and Louie Lung Gin together with other defendants named therein with a conspiracy to violate section 11 of the Act of Congress of May 6, 1882, as amended by the Act of

July 5, 1884, relating to the bringing into the United States from a foreign country of aliens not lawfully entitled to enter. To this indictment, the plaintiffs in error entered a plea of not guilty. (Trans. pages 1 to 7, 12)

After a trial upon the merits, plaintiffs in error were found guilty and a motion for new trial having been interposed in due time, and denied, sentence was imposed. The plaintiff in error Louie Ding was sentenced to serve a term of two years in the Federal penitentiary at McNeil's Island in the State of Washington, and to pay a fine of five hundred dollars, and the plaintiff in error Louie Lung Gin was sentenced to serve a term of fifteen months in the Federal penitentiary at McNeil's Island in the State of Washington. (Trans. pages 14-15, 17.)

In due time a writ of error was prosecuted and the judgment complained of is now before this court for review. (Trans. pages 94 to 106.)

The evidence of the Government disclosed that one of the defendants in the court below, Louie E. Lortie, who had entered a plea of guilty as charged before a trial upon the merits was had and Louie Ding, one of the plaintiffs in error, about the tenth of December 1915 and not earlier than the fourth of December 1915, conspired together for the purpose of bringing into the State of Washington from the

Province of British Columbia a number of alien Chinese persons not lawfully entitled to enter the United States, that for the purpose of carrying out said conspiracy the said Louie Ding entrusted to Louie E. Lortie a certain letter or writing of identification to be presented to another Chinaman in Vancouver, British Columbia, that thereafter on the tenth day of December 1915, certain other defendants who also pleaded guilty to the indictment, named James F. Worthington and Melvin B. Miller, with knowledge of its existence and purposes, joined in and became parties to the said unlawful conspiracy, that thereafter, on the 11th day of December 1915, the defendants Lortie, Worthington and Miller went from the port of Seattle in the State of Washington to the port of Vancouver in the Province of British Columbia on the launch "Blanche W." belonging to one of the conspirators, in furtherance of the general scheme or plan and, upon arrival in the port of Vancouver, one of the conspirators, Worthington, went to the address furnished by the plaintiff in error Louie Ding and arranged for the importation of fourteen alien Chinese, that on the 14th of December 1915 these alien Chinese were brought on board the said launch while she was lying in the port of Vancouver, B. C. and were brought to the city of Seattle, arriving on the 15th or 16th day of December 1915, and being discharged from

the launch at the foot of Harrison Street in the said city. (Trans. pages 23 to 32.)

At the time of the first conference between the defendant Lortie and the plaintiff in error Louie Ding it was arranged that the alien Chinese, if successfully imported, should be delivered at a certain flat or apartment, number 1037 Main Street, in the city of Seattle and that after the landing of the alien Chinese at the foot of Harrison Street, the said defendant Lortie repaired to the address given and notified another of the defendants, and an alleged conspirator, China Dan, and the plaintiff in error Louie Lung Gin of the arrival and also informed them of the fact that there was likely to be trouble in as much as the Federal immigration officials were aware of the surreptitious arrival of the Chinese. The conversation at the flat was between the defendant Lortie and the defendant China Dan, the plaintiff in error Louie Lung Gin being present, but not participating. On the same evening and just before the alien Chinese were taken in custody by the immigration officers, the plaintiff in error Louie Lung Gin was seen in the company of a Japanese named Ito near the landing place at the foot of Harrison Street in the city of Seattle. (Trans. pages 63 to 76.)

In the course of the Government's case in chief, evidence was introduced in relation to two suit cases

containing 150 or 155 five tael tins of opium, and these two suit cases with their contents were admitted in evidence over the objection of the plaintiffs in error. (Trans. 55, 56, 61, 65, 66.) The bringing in of this opium was in no way connected with the conspiracy charged in the indictment, but was an independent venture of the defendant Lortie in which his codefendants were in no wise interested. (Trans. pages 54, 55, 56, 58, 59, 63, 64, 65.)

At the close of the Government's case in chief, a motion for directed verdicts of acquittal was interposed on behalf of plaintiffs in error and after argument was denied. (Trans. pages 66, 67.)

After the Government had rested, evidence was introduced on behalf of the plaintiffs in error to show that they were not present in the city of Seattle at the time when the Government claimed the conspiracy had been formed, but were absent from the state of Washington from the first day of December 1915, until, in the case of Louie Ding the 26th day of December 1915, and, in the case of Louie Lung Gin, the 15th of December 1915. (Trans. pages 33, 49.)

At the conlcusion of the entire case, and before the court's instructions were given, the plaintiffs in error renewed their motion for a directed verdict of acquittal, which motion was denied, and an exception allowed. (Trans. page 89.)

After argument by counsel for the respective parties, certain instructions, which are specifically set forth in the assignments of error herein and upon which error is predicated, were given to the jury.

ASSIGNMENTS OF ERROR

I.

The court erred in instructing the jury that it was not necessary for the government to establish by the evidence that the conspiracy alleged in the indictment was entered into on the tenth of December 1915, the date alleged in the indictment, and that it was sufficient if the evidence disclosed that the conspiracy was entered into at any time within three years prior to the filing of the indictment by the grand jury, to-wit, within three years of the 15th day of March 1916. Said instruction was as follows:

> "Now in this case there was some evidence presented here by the defendant Ding of what is termed in some offenses as an alibi, that is, he was at another place at the time when the witnesses on the part of the Government show, as they claim, that he was here and the conspiracy was entered into; and he could not have entered into the conspiracy because he was in California, for instance. Now you are instructed that if the defendant Ding was not here at the time

that the conspiracy was entered into, of course, he would not, and did not, become a member of it afterwards, and, of course, he could not be held in this indictment. A party may be guilty of a conspiracy even though he is absent, however, in another state; his presence is not necessary, providing testimony would justify a conclusion that he entered into the conspiracy when he was absent. In this case the testimony is that the conspiracy was entered into while he was here. Now the testimony is somewhat indefinite as to just when that conspiracy was entered into. The Government charges it was entered into on the 10th day of December. Now it is not necessary that the Government show that this conspiracy was entered into on the 10th day of December; if the testimony shows that the conspiracy was entered into at any time within three years prior to the time of the filing of this indictment by the grand jury, which was on the 27th day of March 1916, it would be sufficient, and it would be immaterial, where the defendant Ding was at the time when the overt acts were done, or at the time when the co-conspirators went to British Columbia, if you find they did go to British Columbia, and bring over, or attempt to bring over persons who were prohibited by law from entering the United States." (Trans. page 50.)

The plaintiffs in error excepted to this instruction before the jury retired to consider its verdict, as follows:

"We except further to the portion of the charge wherein Your Honor instructed the jury that the exact time of the conspiracy is not

material, and it is sufficient if it appears beyond a reasonable doubt from the evidence that the conspiracy was entered into within three years prior to the return of the indictment in this case, for the reason that when the defense of alibi is interposed in a criminal case the element of time becomes material, as fixed by the evidence of the Government." (Trans. page 51.)

And thereupon the court again instructed the jury upon the subject of time and its materiality to the issue, as follows:

"My instructions with relation to the exact time not being material may have been just a little general. Now while the law is, it being sufficient if the offense was proven at any time within three years prior to the time of the filing of the indictment, this conspiracy entered into and some overt act done, the conclusion must be arrived at from the evidence; you would not be justified in coming to a conclusion as to that arbitrarily, it must be predicated upon testimony, and that is submitted to you as to what the testimony is on the part of the Government, and on the part of the defense, with relation to that time, and you will conclude upon that evidence the testimony on the part of the Government; you remember what it was, it is not necessary for me to refer to it, and you will determine whether it was inconsistent with any other testimony which was offered." (Trans. pages 51, 52.)

II.

The court erred in admitting in evidence, over the objection of the plaintiffs in error, as part of the Government's case in chief, two suit cases, and their contents consisting of about one hundred and fifty cans of opium, for the reason that the plaintiffs in error were not charged in the indictment with illegally importing opium.

The proceedings and evidence in this regard were as follows:

"Q. (By Mr. Martin, District Attorney) Did you see any opium or other merchandise brought on board?

A. (By the witness, James F. Worthington) No, that was put on while I was up in town, seeing the Chinese * * *

Q. Did you see any suit cases on the boat that night?

A. Yes sir, I had two of them.

Q. Mr. Worthington, will you come down from the witness stand and examine these suit cases and contents?

A. Yes, sir, those are the ones.

Q. Look at this one, ever see that before?

A. Yes, sir.

Q. Where?

A. Those two were the ones on the boat.

Q. What was done with them?

A. I took them off the boat and put them under the dock.

Q. At the foot of Harrison street?

A. Yes, sir.

Q. What night did you return to the Port of Seattle?

A. What night I got into Seattle?

MR. MARTIN: I now offer in evidence these two suit cases that were marked for identification, Your Honor.

MR. MacMAHON: I would like to inquire whether you had them open before the District Attorney?

A. Yes, I carried them.

Q. Where?

A. On board the boat.

Q. What for?

A. To look in them to see what was in there.

Q. How do you know they are the same now as they were then?

A. In fact, I can swear it was the same.

Q. Did you count the number of tins?

A. No, I didn't count them.

Q. Have you ever seen other tins of opium besides these anywhere?

A. Yes, several of them.

Q. Did they all look alike?

A. Not all of them.

Q. Did you ever see any like this—looked like these?

A. Yes, sir.

Q. You saw similar tins to these?

A. Yes.

Q. You don't know whether there is the same number in this suit case as when you looked at it??

A. I don't know only what Lortie told me there was a hundred and fifty-five cans all together.

Q. You never counted them?

A. I never counted them.

Q. You don't know what is in them except what he told you?

A. I know there is opium in there.

MR. MacMAHON: (Attorney for Plaintiffs in Error) We object to their admission.

THE COURT: Admitted.

MR. MacMAHON: Exception.

THE COURT: Note an exception." (Trans. pages 63 to 66).

III.

The Court erred in denying the motion of the plaintiff in error Louie Lung Gin for a directed verdict of acquittal made at the close of the Government's case in chief, which motion was based upon the following grounds:

(a) Insufficiency of the evidence to establish the existence of any conspiracy to import alien Chinese;

(b) Insufficiency of the evidence to show that said plaintiff in error knew of or was connected with the alleged conspiracy during its existence;

(c) That the alleged conspiracy was consummated and merged into the substantive offense of importing a prohibited class of aliens.

IV.

The Court erred in denying the motion of the plaintiff in error Louie Ding for a directed verdict of acquittal made at the close of the Government's case in chief, which motion was based upon the following grounds:

(a) Failure of the plaintiff to establish by proof the existence of a conspiracy to import alien Chinese;

(b) Insufficiency of the evidence to show that

said plaintiff in error knew of or was connected with the alleged conspiracy during its existence.

(c) That the alleged conspiracy was consummated and merged into the substantive offense of importing a prohibited class of aliens.

V.

The Court erred in denying the motion of the plaintiff in error Louie Lung Gin for a directed verdict of acquittal made at the close of the entire case, which motion was based upon the same grounds as were urged by said plaintiff in error upon his motion for a directed verdict made at the close of the Government's case in chief.

VI.

The Court erred in denying the motion of the plaintiff in error Louie Ding for a directed verdict of acquittal made at the close of the entire case, which motion was based upon the same grounds as were urged by said plaintiff in error upon his motion for a directed verdict made at the close of the Government's case in chief.

VII.

The Court erred in instructing the jury that a reasonable doubt is one for which the jurors could

give a reason. The instruction complained of is as follows:

> "Now a reasonable doubt is just such a doubt for which you can give a reason. When a juror is convinced to a moral certainty of the truth of the fact then he is convinced beyond a reasonable doubt. It is not a doubt which is imaginary, conjectural or speculative. Sometimes we say a reasonable doubt is such a doubt as a reasonable person in determining an issue of like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusions." (Trans. page 90).

To this instruction the plaintiffs in error duly excepted as follows:

> MR. BELL: (Attorney for plaintiffs in error) "The defendants desire to except further to the definition which Your Honor gave on a reasonable doubt, particularly that portion of the charge where you stated to the jury that a reasonable doubt was one which they must be able to give a reason for." (Trans. page 90).

VIII.

The Court erred in instructing the jury that it was not concerned with the three defendants, Lortie, Miller and Worthington, who had pleaded guilty and were awaiting sentence at the time they testified on behalf of the Government. The instruction complained of is as follows:

"Neither are you concerned with the fact that the defendants who are charged in this indictment with the commission of this offense in conjunction with the other defendants, entered a plea of guilty, have not been sentenced; that is not a matter for your concern; that will be disposed of by the proper officers of this court, but you can take that into consideration together with all the evidence of the witnesses that was presented here upon the witness stand, the demeanor of these defendants in their testimony, and determine, if you believe that they have been promised immunity or anything of that kind, will take that into consideration in weighing their testimony, but if from all of the circumstances as disclosed in this case by the witnesses you believe that should not be given any weight or emphasis, you will so disregard it; otherwise you will consider it in a way that you, as twelve honest, fair-minded men believe it should be considered." (Trans. pages 90, 91).

To this instruction the plaintiffs in error duly excepted as follows:

MR. BELL: (Attorney for plaintiffs in error) "The defendants further except to the portion of the charge to the jury wherein Your Honor instructed them that the fact that the defendants who have plead guilty—that the fact that certain defendants who have testified in this case have plead guilty is no concern of the jury." (Trans. page 91.)

IX.

The Court erred in denying the motion of the plaintiff in error Louie Ding for a new trial, made upon the following grounds:

(1) That said verdict is against and contrary to law. (2) That said verdict is against and contrary to the evidence. (3) Insufficiency of the evidence to justify the verdict. (4) Errors of law occurring during the trial, and excepted to at the time by the said defendants. (5) Erroneous instructions given to the jury by the trial judge, and particularly that part of the instructions wherein the trial judge instructed the jury that they would be justified in finding said defendants guilty if the evidence established beyond a reasonable doubt that the offense charged in the indictment had been committed any time within three years prior to the filing of said indictment." (Trans. pages 14 and 15.)

X.

The Court erred in denying the motion of the plaintiff in error Louie Lung Gin for a new trial made upon the following grounds:

(1) That said verdict is against and contrary to law. (2) That said verdict is against and contrary to the evidence. (3) Insufficiency of the evidence to

justify the verdict. (4) Errors of law occurring during the trial, and excepted to at the time by the said defendants. (5) Erroneous instructions given to the jury by the trial judge, and particularly that part of the instructions wherein the trial judge instructed the jury that they would be justified in finding said defendants guilty if the evidence established beyond a reasonable doubt that the offense charged in the indictment had been committed any time within three years prior to the filing of said indictment." (Trans. pages 14, 15.)

XI.

The Court erred in sentencing the plaintiff in error Louie Ding to serve a term of two years' imprisonment in the United States penitentiary at McNeil's Island in the State of Washington, and to pay a fine of $500.00.

XII.

The Court erred in sentencing the plaintiff in error Louie Lung Gin to serve a term of fifteen months' imprisonment in the United States penitentiary at McNeil's Island in the State of Washington.

ARGUMENT

First

The discussion in this subdivision will relate to the correctness of the court's instruction upon the subject of the defense of alibi and the time within which the jury was permitted to find the commission of the offense alleged. In the indictment the formation of the conspiracy was specifically fixed as the tenth day of December 1915, and the place as Seattle, in the Northern Division of the Western District of Washington. (Tr. pages 1 and 2.) In the opening statement of counsel for the Government it was stated that the conspiracy commenced in Seattle on the tenth of December 1915 and the first overt act in furtherance thereof was committed on the same date, and at the same place. (Trans. pages 23, 24.)

The witnesses for the Government fixed the time of the formation of the conspiracy alleged as between the fourth and tenth days of December 1915, and the place of its formation as Seattle, Washington. (Trans. pages 25 to 32.)

The evidence for the defense disclosed that the plaintiff in error Louie Ding left the City of Seattle of the ~~third~~ first day of December 1915 and did not re-arrived in the city of San Francisco on the evening

of the third day of December 1915 and did not return to the state of Washington until after the 25th of December 1915. (Trans. pages 33 to 49.)

The evidence for the defense disclosed further that the plaintiff in error Louie Lung Gin was absent from the city of Seattle and the State of Washington from October 15, 1915, until December 15, 1915. (Trans. pages 37 to 44.)

The evidence, therefore, clearly tendered and supported the defense of alibi.

As a general rule in criminal prosecutions, the exact time of the commission of the offense is not material so long as the evidence shows that it was committed within the period fixed by the statute of limitations applicable to the particular offense. To this general rule, there is one notable exception, and that is in cases where the defense of alibi is interposed and is supported by the evidence.

In such exceptional cases, the exact time becomes material and if the evidence of the prosecution fixes the time of the commission of the offense within a certain hour of the day or within any specified day, or within any specified period, and the evidence of the defendant shows or tends to show that he was not present during the hour of the day or the period fixed, but was in fact elsewhere, it is erroneous for the trial judge to instruct the jury to find

him guilty if they are satisfied beyond a reasonable doubt that he committed the offense charged at any time within the period fixed by the statute of limitations, and is prejudicial to the defense interposed. Indeed, such instruction under such conditions not only ignores but absolutely destroys the defense of alibi. This is the uniform holding of the courts.

In the case of *State vs. King,* 50 Wash. 312, at page 315, 97 Pac. 247, this question was considered and the rule here contended for announced as follows:

> "The statement of the court that, 'I will say in that connection that the exact date is immaterial. It does not make any difference so far as the crime is concerned if the defendant committed the crime as charged at any time within the period of three years prior to the time the information was filed,' etc. was misleading and erroneous in the connection in which it was used. The witnesses for the state had fixed the date when the crime was committed as being between the 12th and 15th day of February 1907. The defense was that the defendant was not the person who obtained the money, and that he was sick at home, unable to leave his room between those dates. The time of the commission of the crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct, but was misleading and erroneous in this case because the time was definitely fixed by the state, and the defense of an alibi was based upon that time.

It is difficult to imagine a case where the time of the commission of a crime is not material to the defense of alibi."

In a later case in the same court, *State vs. Moss,* 73 Wash. 430, 436, 131 Pac. 1132, it was said,

"The principle that the evidence may narrow the issue so as to make the exact time a material factor is announced in *State vs. King,* 50 Wash. 312, 97 Pac. 247. In that case the defendant was prosecuted for obtaining money under false pretenses. The defense was an alibi. The state's witnesses fixed the date of the crime as between the 12th and 15th of February. We held that the date of the commission of the crime was material, and that an instruction to the effect that the exact date was immaterial, and that it was sufficient if defendant committed the crime at any time within the period of three years before the filing of the information, was misleading and erroneous. So, also, in the case before us. The issue was narrowed so that the time became material."

In a still later case, *State vs. Morden,* 87 Wash. 472, 151 Pac. 832, the same question is discussed and the rule more fully stated,

"Among the instructions given by the court was one as follows:

'The court instructs you that the date stated is not one of the material allegations of the information which has to be proved as laid. It is sufficient if the state has shown that the crime charged was committed on or about the 30th day

of September, 1913, and within three years previous to the filing of the information in this case, which was on December 18, 1913.'

"The appellant contends that this instruction was fatally erroneous. As hereinbefore stated, the testimony introduced on behalf of the appellant was mainly directed to proof that the prosecuting witness was not present at the time and place testified to by her as the time and place when and where the alleged offense was committed. She testified to the effect that she thought the offense was committed on September 30, 1913; that she was not quite sure that it was September 30, but she was sure that it was on a Tuesday and on the day when the appellant's wife returned from a visit to Portland, where she had gone to place her daughters in school. The appellant, his wife, and several other witnesses all testified that Mrs. Morden returned from her visit to Portland between ten and eleven o'clock in the forenoon of Tuesday, September 30, 1913. It is, therefore, clear that, while the prosecuting witness was not certain as to the day of the month, she did fix the date of the crime as testified to by her, by her positive reference to the day Mrs. Morden returned, as the 30th day of September, 1913. There was, therefore, no dispute as to the exact date of the alleged offense. The evidence as to its commission was all to the effect that it occurred, if at all, on that certain day. Appellant's defense tending to show, by the testimony of several witnesses, that the prosecuting witness did not work for the appellant and was not present on his premises on that day, while not technically an attempt to prove an alibi, was very much of the

same nature. It was, in effect, an effort to prove an alibi of the prosecuting witness. She, by her own testimony, having definitely fixed the exact date when she charges that the crime was committed, this defense made the commission of the crime on that exact date the controlling issue in the case. The time charged was, therefore, as clearly material as it would have been had the defense been an alibi.

In *State vs. King,* 50 Wash. 312, 97 Pac. 247, the state's evidence fixed the date of the offense as between the 12th and 15th of a certain month. Upon the defense of an alibi, there was evidence that during that period the defendant was at home, sick in bed, and therefore could not have committed the offense. In that case, this court held an instruction, to the effect that the exact date was immaterial and that it was sufficient if the defendant committed the crime at any time within three years prior to the time the information was filed, constituted misleading error. We said: 'It is difficult to imagine a case where the time of the commission of a crime is not material to the defense of alibi.' In all reason, as it seems to us, it is just as difficult to imagine a case where the defense is that the victim of a personal assault was not present at the time and place when the assault must have been committed, if at all, in which the time of the commission of the offense would not be material to such a defense. While under the statute Rem. & Bal. Code, Sec. 2060 (P. C. 135 Sec. 1025), it is not essential that the precise time of the offense charged be alleged in the indictment or information, the question here presented is not one of allegation, but of proof and of the necessity for

an instruction applicable to the proof. The instruction complained of was erroneous. It withdrew from the jury the appellant's chief defense."

See also, to the same effect,

People vs. Morris, (Cal.) 84 Pac. 463.

In the present case the place of the formation of the alleged conspiracy was fixed at Seattle and the time fixed as between the fourth and tenth days of December, 1915. The evidence of the defense established that the plaintiffs in error were absent from the State of Washington during that period. The trial judge instructed the jury that the exact time of the formation of the conspiracy was immaterial, provided they found from the evidence that it was formed at any time within three years prior to the returning of the indictment. The effect of this instruction was to exclude the defense of alibi from the consideration of the jury and was clearly erroneous and prejudicial.

SECOND

The second assignment of error calls in question the action of the trial judge in admitting over the objection of the plaintiffs in error some 150 tins of opium. Plaintiffs in error were not charged in the indictment with the illegal importation of opium or with the formation of a conspiracy to do so. The

bringing in of this opium was a separate and independent transaction and was in no wise connected with the conspiracy charged in the indictment and the admission of this evidence was highly prejudicial to the plaintiffs in error. They, as well as most of the other defendants charged as conspirators, were Chinese. In view of the popular impression that all Chinese handle and most Chinese use opium, the admission of this evidence was bound to inflame and prejudice the minds of the jurors against the plaintiffs in error and confuse their minds as to the real issue submitted for their determination.

In the case of *Boyd vs. United States,* 142 U. S. 450 on the trial of a person indicted for murder, it appeared in evidence that the killing followed an attempt to rob. The court admitted, over objections, evidence tending to show that the prisoner had committed other robberies in the neighborhood on different days, shortly before the time when the killing took place and it was held that this evidence was inadmissible and prevented the defendant having a fair trial. In discussing this question, the court uses the following language, at page 457:

> "If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the pur-

pose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the court. But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and the injury done the defendants in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however

full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

In the case of *State vs. Pryor,* 67 Wash. 216, 121 Pac. 56, evidence of other crimes not connected with the crime charged in the information was introduced and after its introduction into the case was stricken by the trial court, and the jury cautioned to disregard it, and notwithstanding this action of the court, the appellate tribunal held that it was impossible to remove from the minds of the jurors the prejudicial effect of the improper testimony and reversed the case for a new trial. We quote briefly from the opinion:

"On cross-examination of the defendant, the state's attorney, notwithstanding the fact that the evidence had been stricken, questioned him concerning the alleged acts of sodomy. This was highly improper. While the court sustained an objection thereto, and instructed the jury to disregard this, its tendency was to keep before the minds of the jury the stricken evidence.

"These errors were so vital, and the effect of the incompetent evidence, from its very nature, so prejudicial, that we cannot say that they were cured by the order to strike, and the instruction to disregard. If the testimony of the prosecuting witness as to the other two crimes not charged in the information was believed, it would inevitably create a prejudice in the mind of any human being not lower in his moral

makeup than the beasts of the field. We have no assurance that the jury did not believe it. It would be to the credit of the jury, rather than to its discredit, if, believing this testimony, it entertained a prejudice against the accused, ineradicable by any order striking the testimony, or by any instruction, however clear and forcible, to disregard it. A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and a just application of its principles. It may be that the defendant is guilty. On that we express no opinion. It must be remembered, however, that 'though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community'. *Hurd vs. People,* 25 Mich. 404."

THIRD

Under this subdivision we will discuss briefly assignments of error three and five. These assignments involve the action of the trial court in refusing to direct a verdict of acquittal in favor of the plaintiff in error Louie Lung Gin.

The evidence for the Government failed to disclose that this plaintiff in error ever knew of the existence of the alleged conspiracy or of its purpose, or that he ever, with knowledge of its existence and purpose, aided, abetted or participated therein. So far as he is concerned the evidence shows simply that he was the nephew of Louie Ding, a codefendant,

that on the night of the arrival of the alien Chinese in the city of Seattle, Lortie, an admitted conspirator found him at the flat on Main Street, originally designated by another alleged co-conspirator as the place of the delivery of the aliens, and that he was seen in the neighborhood of the dock at the foot of Harrison Street in the city of Seattle under which the alien Chinese were secreted after their arrival.

It is elementary that for the crime of conspiracy, or other criminal offenses, no person should be convicted upon mere suspicion, or because he may have had an opportunity to commit the crime charged, or upon circumstantial evidence unless the circumstances are so connected and of such a character as to exclude every hypothesis save that of guilt.

In addition to the lack of proof as to the knowledge of the existence and participation in the unlawful conspiracy, the conspiracy had been consummated by the landing of the alien Chinese in the City of Seattle before any knowledge of the plan and purpose of the conspirators had been brought home to the plaintiff in error Louie Lung Gin. This being the condition of the evidence at the close of the Government's case it was error on the part of the trial judge to refuse to direct a verdict of acquittal in his favor.

FOURTH

Under this subdivision, we will discuss the instruction given by the trial judge upon the subject of reasonable doubt, which is set forth verbatim in the assignment of errors herein, ante page 14.

Chief Justice Shaw in an early Massachusetts case, *Commonwealth vs. Webster,* 5 Cush. 320, said that the term reasonable doubt is a term often used, probably pretty well understood, but not easily defined. The difficulty of defining it with precision seems to exist at the present time, if the number of appeals involving the instructions on this subject is any criterion. Whatever may be said in favor of or against the various definitions given by trial judges from time to time upon this subject, all authorities seem to agree uniformly that it is improper and erroneous to state to a jury in a charge upon this subject that a reasonable doubt is such a doubt as the jurors are able to give a reason for.

It would seem clear that a juror might entertain a reasonable doubt as to the guilt of the defendant based upon the evidence, without being able to give a reason therefor, either sound or indifferent. His inability to furnish a reason or reasons for his doubt to his fellow jurors ought not to deprive the defendant of the benefit of that doubt.

In the present case the trial judge told the jury in unmistakable terms that a reasonable doubt is one for which they should be able to give a reason. This was erroneous, misleading and prejudicial.

A similar instruction was before the appellate court in the case of *State vs. Cowen,* 108 Ia. 208, 78 N. W. 857, and it was there held to be erroneous and prejudicial to the rights of the defendant. The language of the court is as follows:

> "Nor can we approve the fifth instruction as a safe definition of 'reasonable doubt': 'By a "reasonable doubt," as herein instructed, is meant a doubt such as a reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant. In a legal sense, a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for.' The last clause is the one to which exception is taken. Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case ex-

cluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached."

In *Siberry vs. State,* 133 Ind. 677, 33 N. E. 681, an instruction similar to that given by the trial judge in the present case is criticised in the following language:

"Again, in the fifty-fifth instruction, the jury is told that a 'reasonable doubt is such a doubt as the jury are able to give a reason for.' The term 'reasonable doubt' would seem to imply a doubt for which there was a reason, but, when analyzed and considered in the connection in which it is used in a criminal case, it seems to us that this definition is erroneous and misleading. It is possible that the term 'beyond a reasonable doubt,' which has crept into the criminal law as expressing the degree of certainty with which the guilt of the accused shall be proven to justify a conviction, is not as comprehensive as some other language would be; that the term, of itself, is uncertain. We have a doubt in relation to things about which we can give no reason, and of which we have imperfect knowledge. It is the want of sufficient knowledge in relation to the facts constituting the guilt of the accused that causes the juror to doubt. It is the want of information and knowledge that creates the doubt. This court has said, in effect, that to justify a conviction the evidence must satisfy such juror of the guilt of the accused with such a degree of certainty as he would not hesitate to act in matters of the highest importance to himself, affecting his dearest and nearest inter-

ests, under circumstances where he was not compelled to act but was free to act or not, as he deemed proper. It is the lack of information and knowledge satisfying the members of the jury of the guilt of the accused with that degree of certainty required by the law which constitutes a reasonable doubt, and if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not. The burden is on the state to furnish each juror such information as, that he, acting under oath, is so convinced of the defendant's guilt that he would not hesitate to act upon his convictions of the guilt of the defendant in relation to matters involving his most important affairs, affecting his dearest and nearest interests. In the case of *Wall vs. State,* 51 Ind. 453, 465, this court said:

'Many learned judges have endeavored to define a reasonable doubt, but perhaps it is not susceptible of a clearer definition than that expressed in the plain words "reasonable doubt," for it is doubt which is cognizable by the reason, and dwells in the understanding, as distinguished from a doubt which is raised by fear, hope, love, hatred, fancy, feeling, prejudice, interest, or some of the motives which sway our natures, and which flit through the emotions instead of resting in the mind.'

A juror is presumed to act honestly, under the solemnity of his oath, with a view of reaching a correct conclusion as to the guilt or innocence of the accused. When he has done so he is not satisfied of his guilt with that certainty

which would cause him to act unhesitatingly in matters of the highest importance to himself, affecting his dearest interests; and in such case the law says he shall not convict, because the proof is not sufficient to satisfy the mind of the juror with that certainty upon which alone he shall convict. When this state of mind exists, the juror has what is termed in the law a 'reasonable doubt' of the guilt of the accused, though the juror may not be able to give a reason for such a doubt, except he might say the evidence is not sufficient to satisfy one of the guilt of the accused with the certainty required by the law; but that is no reason for the doubt. It is but a reason why the accused should not be convicted. Such an instruction as the one we are considering can, we think, only lead to confusion, and to the detriment of the defendant. A juror may say he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers that you have a reasonable doubt of the defendant's guilt; give a reason for your doubt; and under the instruction given in this cause the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt. It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case."

To the same effect, see also:

Ray vs. State, 50 Ala. 104;

Cowan vs. State, 22 Neb. 519, 35 N. W. 405;

Carr vs. State, 23 Nebr. 749;
State vs. Sauer, 38 Minn. 438;
Morgan vs. State, 48 Ohio St. 371; 27 N. E. 710.

FIFTH

Under this subdivision we will discuss the instruction noted in the assignments of errors, ante page 15....., wherein the trial judge told the jury that they were not concerned with the fact that certain of the defendants charged in the indictment as co-conspirators had pleaded guilty but had not been sentenced and that this fact was not a matter for their concern. This was clearly erroneous.

The fact that these defendants had pleaded guilty to the indictment charging the general conspiracy, and sentence upon them was being held in abeyance so that their testimony could be used to bring about the conviction of the plaintiffs in error was a matter of the highest concern to the jury, and was a fact which they were entitled to consider for the purpose of determining the weight and credibility to be attached to their testimony. It was a matter also of concern to the jury in reference to those witnesses whether they had been expressly promised immunity or whether it was tacitly understood between the prosecuting officers and these defendants that immunity would be extended to them.

It was also a matter of the highest concern to the jury that these defendants were admitted accomplices in the commission of the alleged conspiracy. Instead of being told that they were not concerned with the fact that they had pleaded guilty, the jury should have been instructed that this evidence came from a corrupt and polluted source and that they would not be justified in returning a verdict upon such testimony unless it was corroborated by other disinterested and credible testimony. Such is the recognized doctrine of the Federal courts.

United States vs. Lancaster, 44 Fed. 921;
United States vs. Logan, 45 Fed. 890;
United States vs. Howell, 56 Fed. 39;
United States vs. Hinz, 35 Fed. 272;
Commonwealth vs. Holmes, 127 Mass. 424;
2 McClain, Criminal Law, Sec. 990.

Sixth

The other assignments of error, notably nine, ten, eleven and twelve are covered by the discussion in the preceeding subdivisions, and consequently nothing additional need be urged here with special reference to them.

In conclusion we submit that by reason of the errors assigned and presented, this cause should be reversed with instructions to the trial court to dis-

miss the action as to the plaintiff in error Louie Lung Gin or, failing this, that the trial court be directed to grant a new trial herein to said plaintiff in error, and that as to the plaintiff in error Louie Ding the trial court be directed to grant a new trial herein.

Respectfully submitted,

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